



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, WA 98101

OCT 31 2003

Reply To
Attn Of: ORC-158

Fedrick D. Auck, Chairman
Fort Hall Business Council
Shoshone-Bannock Tribes
P.O. Box 306
Fort Hall, ID 83203

Dear Chairman Auck:

It is with great pleasure that I forward the fully executed Memorandum of Understanding (MOU) for Consultation between the Shoshone-Bannock Tribes (SBT) and the U.S. Environmental Protection Agency Region 10 (EPA-R10). The MOU will guide our mutual development of environmental priorities on the Fort Hall Reservation and will assist us to identify consultation opportunities.

In accordance with Article 8 of the MOU, EPA-R10 has begun internal discussions to develop a list of coming actions in fiscal year 2004 which may affect the Ft. Hall Reservation environment or resources of the SBT. Mark Masarik in our Boise office will be the EPA-R10 point of contact under the MOU and will be coordinating this effort with your staff. Mark can be reached at EPA's office in Boise, ID at (208) 378-5761. I also want to acknowledge the steadfast commitment of Jeanette Wolfley, as well as the time and energy she put into the completion of the MOU. We all look forward to implementing the consultation principles and process as found in the MOU.

Please call me at (206) 553-1234 if you would like to discuss the MOU or other matters.

Sincerely,

L. John Iani
Regional Administrator
Region 10

**MEMORANDUM OF UNDERSTANDING FOR CONSULTATION
BY AND BETWEEN
THE SHOSHONE-BANNOCK TRIBES
AND THE
ENVIRONMENTAL PROTECTION AGENCY REGION 10**

Article 1. Preamble

WHEREAS, the Shoshone-Bannock Tribes of the Fort Hall Reservation is a sovereign government which exercises its inherent powers, and powers established by the Constitution and By-Laws of the Shoshone-Bannock Tribes, adopted on April 30, 1936, to preserve and protect the interests of the Shoshone-Bannock Tribes (SBT) including the Fort Bridger Treaty of 1868, the Fort Hall Reservation, the ceded and aboriginal use areas of the Tribes, the Tribal membership, the environment, residents who reside on Reservation, and the general health, welfare and safety of the Tribes; and

WHEREAS, the SBT in the Fort Bridger Treaty of 1868 reserved the Fort Hall Reservation as the permanent homeland of the Tribes, and hunting, gathering and fishing rights; and

WHEREAS, the SBT have inherent sovereignty over lands of the Fort Hall Reservation; and

WHEREAS, the Environmental Protection Agency (EPA) is responsible for providing coordinated and effective governmental action to assure the protection of the environment; and

WHEREAS, the EPA Region 10 (EPA-R10) is the federal agency with primary responsibility for administering federal environmental statutes in the Pacific Northwest; and

WHEREAS, the EPA has a trust responsibility for the protection of the Tribal environment and is responsible for working with Indian tribes on a government-to-government basis to protect the environment for present and future generations; and

WHEREAS, the EPA recognizes the Fort Hall Reservation and treaty rights are invaluable to the SBT and critical to the preservation of the Tribal cultural vitality, the landbase, and present and future generations of the Tribes; and

WHEREAS, the EPA is committed to addressing concerns identified by the SBT regarding the environment and natural resource issues which are within its authority; and

WHEREAS, the EPA-R10 and the SBT (hereinafter also collectively referred to as the "parties") seek to strengthen and maintain a government-to-government relationship for the purpose of building a stable, long term relationship that results in positive, mutually understood, and beneficial solutions to common situations and issues, and to jointly evaluating actions which affect each government; and

WHEREAS, the EPA-R10 is seeking ways to improve its overall tribal consultation procedures and will utilize this opportunity as a pilot effort to evaluate the effectiveness of establishing consultation agreements with individual Tribes,

NOW, THEREFORE, this Memorandum of Understanding is made between the Shoshone-Bannock Tribes and the Environmental Protection Agency Region 10.

Article 2. Purpose and Scope

A. The purpose of this Memorandum of Understanding is to establish a framework and process for fostering coordination and consultation on environmental protection issues, and set forth specific expectations and responsibilities of the SBT and the EPA-R10 regarding consultation, including coordination, communication, information sharing, and the process of decision making.

B. The scope of this Memorandum of Understanding shall apply to coordination, communication, information sharing and decision making regarding environmental issues affecting the SBT and the Fort Hall Reservation for those matters where EPA-R10 is the decision maker. The provisions of this Memorandum of Understanding shall be utilized and adhered to by the parties in guiding how consultation is conducted and how consultation requirements are met.

Article 3. Consultation

A. The parties agree that consultation can vary depending on a variety of factors, including statutory requirements and limitations, proposed actions, decisions, undertakings and studies. Generally, consultation may be described as a process of notice, communication, coordination, respect, cooperation, negotiation and policy level decision making between the SBT and the EPA-R10.

B. The parties agree that there is an ongoing relationship between the two governments that may not be considered formal consultation such as day-to-day collaboration and coordination of matters among the respective technical staff. Such contacts are essential to promote more effective communication and address the myriad of environmental issues affecting the SBT and Fort Hall Reservation.

C. The parties will strive to meet four objectives of consultation under this Memorandum of Understanding as set forth below. The more specific steps for meeting the objectives are outlined in the provisions of this Memorandum of Understanding and include:

1. **Communication:** The SBT and the EPA-R10 will communicate in a timely and open manner in order to protect and manage important Tribal resources, the environment, and Reservation, and facilitate the decision making process.

2. **Information:** The SBT and the EPA-R10 will share and exchange technical and policy information in order to make informed decisions regarding the important Tribal resources, environment, and Reservation.

3. **Decision making Process:** The SBT and the EPA-R10 agree that this MOU establishes a process for making decisions affecting or relating to important Tribal resources, the environment, and Reservation.

4. **Protection of Tribal Interests:** The overriding objective is to protect treaty reserved lands, rights, and resources consistent with the EPA's trust responsibility to the SBT.

D. For purposes of this Memorandum of Understanding, the parties recognize and will be guided by the following principles:

1. Intrinsic to consultation is the recognition by the EPA of the unique legal status of the SBT as established by the Fort Bridger Treaty of July 3, 1868. Accordingly, the EPA-R10 recognizes the importance of direct Tribal participation in all phases of an undertaking which has potential to affect the environment and natural resources protected by Treaty, the federally reserved lands of the SBT, and the residents of the Fort Hall Reservation.

2. Consultation is viewed as an ongoing responsibility which the EPA-R10 will approach with creativity and cultural sensitivity. Consultation with the SBT will continue on an ongoing basis to ensure that specific agency proposed actions and decisions are constructive and effective.

3. The EPA-R10 and the SBT will work in a reciprocal manner in addressing issues and matters affecting the SBT and the Fort Hall Reservation, and work toward a consensus. Where differences exist, EPA-R10 will strive to reach a decision that balances the SBT's position, interests and concerns with the responsibilities of the agency consistent with Federal law.

Article 4. Government-to-Government Consultation

A. The Regional Administrator for the EPA Region 10 is the responsible official for the purpose of formally consulting with the SBT at the government-to-government level, although he/she may, on specific issues, also designate other senior agency representatives to act on his/her behalf.

B. The Fort Hall Business Council, seven member elected governing body of the SBT, is the responsible body for the purpose of formally consulting with the EPA at the government-to-government level.

C. The Region 10 Administrator and Fort Hall Business Council will each designate a Point of Contact who will arrange and complement contacts by the governmental officials, track progress, ensure that the decision making process is properly followed and deadlines met, and generally assist in implementing the consultation process. The designated Point of Contact for the SBT is the Environmental Program Coordinator and for the EPA-R10 is the Shoshone-Bannock Coordinator (an EPA-R10 employee who will be specifically named for purposes of this Agreement). Either the Fort Hall Business Council or EPA-R10 may unilaterally designate a new Point of Contact for their own government upon written notice to the other party.

D. The EPA-R10 recognizes and understands that Tribal technical staff cannot make policy decisions or make formal Tribal decisions without authorization from the Fort Hall Business Council, and accordingly their opinions are not a substitute for formal government-to-government consultation. Tribal staff can provide feedback to, and make requests of, EPA-R10, and will be responsible for briefing the Fort Hall Business Council on environmental matters as part of the consultation process, and for identifying to the Fort Hall Business Council matters that require formal consultation.

Article 5. Communications

A. The goal of communication, both at the level of governmental officials and at the staff level, should be a direct, two-way dialogue. The EPA-R10 and SBT will seek face-to-face meetings to develop rapport and increase understanding of the proposed action, undertaking, or decision. In addition the EPA-R10 and SBT will maintain an on-going dialogue through telephone calls, written correspondence, and other methods of communication.

B. The EPA-R10 and the SBT will maintain honesty and integrity in the consultation process. They will candidly and openly communicate with each other and respond to questions and inquiries on information that will assist the SBT in making an informed decision that will ultimately assist the EPA-R10 in meeting its consultation responsibilities.

C. For any decision requiring formal consultation with the SBT, the EPA-R10 will acknowledge Tribal interests and concerns, and record, where possible, such concerns for future

reference, and consider in good faith, and respond in a timely manner to, the Tribal interests and concerns to demonstrate that the Tribal input was meaningfully considered prior to making decisions.

D. The SBT and the EPA-R10 will establish staff level relationships to complement contacts at the decision and policy making level. The staff may use telephone calls, meetings, e-mail, and other means of communication to maintain such relationships. The staff will openly communicate with each other on a regular basis and hold meetings, as needed, for information sharing, deliberations on documents, and clarification and observation of the information provided.

E. Any formal consultation communications will begin by mailing of appropriate documents via the United States mail or overnight express delivery. Informal communications may be accomplished via facsimile telecommunications, and/or the e-mail system of the Internet.

F. Prior to any consultation meeting the parties will jointly agree upon an agenda and topics of discussion. In some instances it may be appropriate to hold formal consultation via a conference call or, by mutual advance agreement, consultation may consist of or be supplemented by an exchange of written communications. The parties may agree to document consultation by preparing a summary of any formal meetings including any recommendations and action items.

Article 6. Confidentiality

A. The SBT may exercise their right to keep confidential information concerning their culture, traditions, language and beliefs, and other SBT Tribal information which the Tribes designate as confidential.

B. The EPA-R10 recognizes that certain deliberations, communications and information shared among the SBT and consultants are confidential and are not open or accessible to non-Tribal staff and individuals. The EPA-R10 agrees to contact the SBT Point of Contact before contacting any individual Tribal consultant or staff to solicit any data, information, or communications developed as part of studies or work relating to environmental matters and issues, and the Tribal position on such issues. (This does not mean, however, that informal, day-to-day contacts between SBT and EPA-R10 staff for purposes of coordination or routine information exchange each need to be individually cleared, unless the release of such information is prohibited by Tribal law.)

C. The EPA-R10 and SBT recognize the difficulties in maintaining confidentiality of deliberative documents by EPA-R10 if shared or obtained from the SBT. EPA will strive to create and implement ways to protect the confidentiality of such documents, while remaining consistent with the requirements of the Freedom of Information Act.

Article 7. Information Sharing

A. The EPA-R10 will begin coordination and consultation with the SBT in the early planning stages of the decision making process including providing the opportunity for pre-draft input to the development of administrative rules and regulatory policies on matters that have significant direct effects on the SBT's interest, lands or environment.

B. The parties, at the staff level, agree to provide and cooperate in the full, open, and prompt exchange of relevant scientific, technological information related to the environmental activity to enable each other to responsibly carry out the provisions of this Agreement.

C. EPA-R10 will prepare documents and statements that clearly describe the proposed EPA-R10 action, undertaking, or decision to Tribal representatives as needed to support consultation. The

EPA-R10 will explain in plain and simple terms what the agency wishes to accomplish, where the agency is in the decision making process, and the nature of the decision to be made. The EPA-R10 will limit the use of acronyms when consulting with the SBT, but, if they must be used, then a clear definition of their meaning will be provided. These documents will be sent to the Fort Hall Business Council, Point of Contact, and technical staff.

D. The parties will provide ample time (more than 45 days, whenever possible) to carry out and complete consultation. This includes time to receive and process consultation information, and respond to requests for consultation. The amount of time needed for effective consultation will vary according to the complexity of the specific matter. At consultation meetings, the SBT and EPA-R10 will allow time for discussion and explanation of technical details, and provide the SBT the opportunity to make inquiries and offer the EPA-R10 well-informed input. Both parties agree to avoid whenever possible situations involving short deadlines. In an instance where a short time frame or deadline is unavoidable, both parties agree to work together to develop a plan and a schedule that will allow for the most effective consultation process under the circumstances.

Article 8. Process of Consultation and Decision Making

A. Policy meetings, unless scheduled otherwise, may be scheduled biannually by the Fort Hall Business Council and the Regional Administrator for Region 10. These meetings will be scheduled to discuss, review, and propose actions relating to policy level decisions and agree upon upcoming decisions which require consultation.

B. At the beginning of each Federal fiscal year (October 1), EPA-R10 will provide to the SBT an inventory of environmental matters involving the Reservation environment or resources of the SBT for which EPA anticipates a proposed action, undertaking, or decision. The SBT will provide to the EPA-R10 a list of issues and matters that may require EPA assistance and funding. Following the compilation of issues, EPA-R10 and SBT staff will meet to identify the issues for consultation and to establish time frames and dates for addressing the proposed actions, plans and decision making, and technical assistance and funding. As necessary, a second midyear meeting may be scheduled to review and update the inventory of consultation matters.

C. EPA-R10 will utilize the following procedures in regard to its notices of proposed actions, plans, rule making or policy decisions. (Note: These are not necessarily mutually exclusive categories and certain actions may require action in more than one of the following categories.)

1. If the action is not included in the annual EPA-R10 inventory or planned EPA activities, the EPA-R10 will notify as soon as possible, in writing, the SBT's Point of Contact prior to any actions, plans, rule making or policy decisions that may require consultation.

a. The EPA-R10 notification will include adequate information to fully describe the matter, including where appropriate, such items as:

- i. Description of the proposed action, plan, rule making or policy decision including all relevant background information.
- ii. Description of the location of the proposed action using maps, photographs, location of survey, study, project or inventory, or proposed language for rule making.

- iii. Identification of the key EPA personnel that the SBT may contact for more information regarding the proposed action, plan, study project or inventory, or proposed language for rule making.
- iv. Identification of all proposed dates planned for such action, plan, study, project or inventory, or proposed language for rule making.

b. The SBT environmental staff will be responsible for the following upon receiving such notification:

- i. The SBT staff will distribute the EPA-R10 notice to the Fort Hall Business Council, the Land Use Policy Commission and Point of Contact, and coordinate the review.
- ii. Within 21 days of distribution of the notification, the Tribal staff will meet with the Fort Hall Business Council to inform them of the proposed EPA-R10 action, and to obtain the recommendations and direction of the Fort Hall Business Council on how to proceed on the proposed action.
- iii. Following the meeting with the Fort Hall Business Council and the Land Use Policy Commission, the Tribal staff person will contact the EPA-R10 staff person and inform them of the Fort Hall Business Council's decision or position.

2. If the proposed action relates to a rule making or decision that would be published in the Federal Register and directly affects the SBT or its interests, Reservation or environment, the Tribal staff will work directly with the EPA-R10 staff in drafting or recommending changes in the rule making language.

a. The Tribal staff will be responsible for informing the Fort Hall Business Council and Land Use Policy Commission of the progress of the rule making drafting process.

b. When a full draft of the language for rule making is completed the SBT staff and EPA-R10 staff will distribute the draft documents to the policy level decision makers for review and comment.

c. Following a review of the comments by the policy level decision makers, a meeting will be scheduled if requested between the Fort Hall Business Council and the Region 10 Administrator to review, discuss and exchange perspectives on the proposed language. The Fort Hall Business Council and Region 10 Administrator will work toward reaching a consensus on the proposed rule making language.

d. The decision of the Fort Hall Business Council regarding the rule making may be embodied in a Resolution and forwarded to the Region 10 Administrator and Tribal staff.

e. A public hearing will be considered on the Fort Hall Reservation to receive Tribal member input should the rulemaking impact the Tribal member interests.

3. If there is a Region 10 Administrator proposed action relating to a policy decision or request that may affect the SBT, environment or lands, the EPA-R10 Point of Contact will communicate and inform the SBT's Point of Contact about the proposed policy decision or request.

- a. The SBT Point of Contact will be responsible for informing the Fort Hall Business Council and Land Use Policy Commission about the proposed policy decision or request.
 - b. A meeting will be scheduled if requested between the Fort Hall Business Council and the Region 10 Administrator to review, discuss, and exchange perspectives on the proposed policy decision or request. The parties will work toward reaching a consensus on the proposed policy decision or request.
4. If there is an issue or matter where the SBT is requesting EPA action, a rule making or policy decision, the SBT Point of Contact will communicate and inform the EPA-R10's Point of Contract about the issue, request or policy decision.
- a. The EPA-R10 Point of Contact will be responsible for informing the Region 10 Administrator about the issue, request or policy decision.
 - b. A meeting will be scheduled if requested between the Fort Hall Business Council and Region 10 Administrator to review, discuss and reach a decision on the proposed Tribal request or issue.

Article 9. Duration, Termination, and Modification

- A. This Memorandum is effective upon the date of signature by both parties.
- B. This Memorandum will remain in effect until and unless terminated by mutual agreement of the parties. Either party to this Agreement may withdraw from this Agreement by providing thirty (30) days notice to the other party.
- C. This Agreement may be modified in writing upon the request of either party. All modifications must be mutually agreeable, in writing and signed by the signatories or the duly authorized representative. The parties recognize that the consultation process is an evolving one and the parties will endeavor to negotiate modifications to this Agreement where it appears appropriate to do so. The parties will discuss the terms of this Agreement on an annual basis to determine if any modification should be made.

Article 10. Reservation of Rights

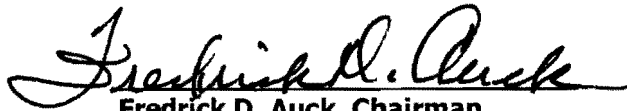
- A. The parties to this Agreement recognize the sovereignty and legal status of one another. The parties reserve all rights, powers, and remedies now and hereafter existing at law or in equity, or by statute, treaty, or otherwise. This Agreement does not modify, diminish, or alter the rights and entitlements of the parties.
- B. The SBT participation in this Agreement does not constitute a waiver of sovereign immunity by the Tribes.
- C. This Agreement modifies and supercedes any provisions of the Tribal Environmental Agreement Between the EPA Region 10 and the SBT, dated February 1998, relating to consultation.
- D. This Agreement is intended solely for the purpose of facilitating intergovernmental cooperation between the parties in the area of consultation. This Agreement is not and shall not be used as precedent for other relationships of the parties, or resolution for any other disputes between the

parties and does not create any rights in the parties or other persons to seek administrative or judicial enforcement of any of its provisions.

Signatures

By their signatures, the undersigned parties represent that they have the authority to bind the parties they represent.

Shoshone-Bannock Tribes



**Fredrick D. Auck, Chairman
Fort Hall Business Council
Fort Hall, Idaho**

Environmental Protection Agency Region 10



**John Iani, Administrator
EPA Region 10
Seattle, Washington**